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Canon Law, American Law, and Governance of Catholic Schools: A Healthy Partnership

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As detailed below, Roman Catholic schools developed in the United States during the latter part of the 19th century partially in response to a significant wave of anti-Catholic sentiment that swept the nation. Consequently, Catholic schools were established as a kind of parallel system largely free from civil laws, as bishops, pastors, and other religious leaders were free to operate their schools largely under the Church's own internal juridical system, the Code of Canon Law. However, by the middle of the 20th century, due to a variety of demographic factors, the composition of Catholic schools began to change dramatically, particularly with regard to the composition of their faculties from being largely composed of members of the religious life to predominately lay. At the same time, changes in the legal environment in the United States also significantly impacted Catholic schools since they provided leaders with greater mechanisms for control over the schools.

Along with the transformation in the make up of teachers, leaders in Catholic schools led the initiative to ensure that religious leaders would be able to retain significant governance authority in their schools even as Congress enacted federal anti-discrimination statutes, most notably Title VII of the Civil Rights Act of 1964. While Title VII proscribes discrimination on a variety of factors, most notably, for the focus of this article, religion, Church leaders sought to retain control over their schools through statutory exemptions that would essentially have afforded them the opportunity to continue to rely on the Code of Canon Law and Church teachings as the primary juridical vehicle in school governance.

In light of the healthy working relationship, or partnership, between American civil law and the Code of Canon Law, this article is divided into four substantive sections. After providing an overview of the background on Catholic schools in the first section, the next part of the article highlights key elements of canon law relating to Catholic schools. The following part examines the role of contracts and federal anti-discrimination statutes along with

representative illustrations of litigation interpreting and applying these laws in disputes impacting the governance of Catholic schools. These two sections of the article examine the ways in which canon law and American law interact when bishops and educational leaders assert their governance authority over schools, and, more properly, their employees, mostly teachers, who are seeking to ensure their contractual and statutory rights. This part of the article pays particular attention to Title VII, the major federal anti-discrimination in employment statute because the exemptions that it grants to religious employers to avoid charges of discrimination based on religion essentially defer to the Code of Canon Law as the vehicle driving governance in Roman Catholic schools. The final substantive section of the article reflects on the relationship between the two divergent systems of law that are at the center of this analysis while offering seven recommendations for educational leaders in Catholic institutions who must walk the fine line between complying with the Code of Canon Law and American civil law in the governance of their schools. The article rounds out with a brief conclusion.

American Catholic Education

Roman Catholic schools were established in the United States during the late 19th century in the wake of growing anti-Catholic sentiment. Following the lead of President Ulysses S. Grant's final State of the Union Address on December 7, 1875, in which he called for a constitutional amendment "prohibiting the granting of any school funds, or school taxes or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination," anti-Catholic bias became more wide spread.

Shortly after Grant delivered his State of the Union Address, James K. Blaine, a republican senator from Maine, introduced a constitutional amendment that would have prevented aid from going to schools "under the control of any religious sect," a not so secret code for Roman Catholic schools (Blaine, 1875). Although the amendment was rejected in 1876, a majority of states adopted, and retain, Blaine-type constitutional provisions that place substantial limits on the amount of financial aid, if any, that states can provide for religious institutions, including schools. As a result, since Catholic schools were not entitled to receive public funds, and were largely excluded from governmental oversight of education, the bishops, along with other Church leaders, most notably local pastors, were able to create governance structures pursuant to the Code of Canon Law that allowed them to control all aspects of school operations. The most significant issue impacting governance for the

purposes of this article pertains to the hiring and retaining of faculty members, an activity in which educational leaders in Catholic schools operate in what may be described as a parallel juridical system under the auspices of canon law that shares occasional arcs with American civil law.

Acting in large part in response to the wave of anti-Catholic sentiment, in 1884 the Third Plenary Council of Baltimore, a gathering of American Catholic bishops, forever changed the shape of nonpublic education in the United States when it decreed:

That near every church a parish school, where one does not yet exist, is to be built and maintained in perpetuum within 2 years of the promulgation of this council, unless the bishop should decide that because of serious difficulties a delay may be granted. (Title VI, Section 189, Section I, as cited in McCluskey, 1964, p. 94).

The council further mandated:

That all Catholic parents are bound to send their children to the parish school, unless it is evident that a sufficient training in religion is given either in their homes, or in other Catholic schools; or when because of sufficient reason, approved by the bishop with all due precaution and safeguards, it is licit to send them to other schools. What constitutes a Catholic school is left to the decision of the bishop. (Title VI, Section 189, Section IV, as cited in McCluskey, 1964, p. 94)

In light of the council's dictates, the rapidly increasing Catholic immigrant population, buttressed by a seemingly endless supply of priests, brothers, and nuns, established a loosely coupled system of schools that were staffed almost exclusively by members of the religious life and embarked on a period of remarkable growth in terms of the numbers of schools that opened and students who attended these schools. The 200 Catholic schools in 1860 grew to more than 1,300 in the next decade and by the turn of the century approximately 5,000 Catholic schools were operating in the United States (Mahar, 1987).

The Supreme Court's 1925 ruling in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (*Pierce*) served as a kind of Magna Carta for Roman Catholic and other nonpublic schools by upholding their right to operate. In *Pierce* the justices unanimously reasoned that enforcement of the compulsory statute from Oregon that would have restricted parents by requiring them to send their children to public schools, thereby denying them the opportunity to have their children educated in nonpublic schools, was unconstitutional. The court invalidated the law because it not only infringed

on the due process rights of the schools to operate, but also violated the prerogatives of parents to direct the upbringing of their children by sending their young to the nonpublic schools of their choice. At the same time, the *Pierce* court recognized the power of the state "reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils" (p. 534). In *Pierce* the court added that while states may oversee such important features as health, safety, and teacher qualifications relating to the operation of nonpublic schools, they could not do so to an extent greater than they did for public schools. In reality, since states restricted their oversight to health and safety concerns, they deferred to religious authorities on the key governance question of teacher qualifications at a time when faculties were almost exclusively religious, most of them in vowed life subject to obedience. The net result was that Catholic bishops and pastors had an even freer hand to establish governance structures grounded in Church canon law that remained unfettered despite the presence of a growing body of law in the United States protecting the rights of teachers.

Over the ensuing 40 years, the 10,912 Catholic schools in 1945 grew at a rapid rate, peaking in 1965 at which time 14,296 schools were in operation (Greeley, McGready, & McCourt, 1976). However, beginning in the late 1960s Catholic schools entered a period of steady decline that lasts to the present day. The factors contributing to this decline included a sharply diminished birthrate, migration of Catholic families from urban to suburban areas where Catholic schools were not as readily available, the rising costs of tuition in Catholic schools since lay teachers were paid more than members of religious communities, greater acceptance of public schools by Catholic parents, and changing social attitudes as Catholics moved into the mainstream of American social and cultural life (Greeley, McGready, & McCourt, 1976). At present, 7,378 Catholic schools remain in existence (McDonald, 2008).

At the same time, as the American Catholic Church entered the 1960s, it experienced a sharp decline in the number of men and women entering the religious life. This dramatic drop in the number of priests, brothers, and nuns was accompanied by a rise in the percentage of lay faculty members in Catholic schools. This shift had a profound effect on American Catholic education, both in terms of financial implications and the challenge to individual schools to maintain their Catholic identities and governance structures in the face of the growing secularization of faculties and teacher militancy in the form of unionization. A review of the composition of the faculty reveals that between 1920 and 1950, religious teachers accounted for more than 90% of faculties in Catholic elementary schools and over 80% in the high schools. More specifically, in elementary schools, 92.8% of teachers were religious in

1920; 91.7% in 1930; 93.9% in 1940; and 92.9% in 1950 (McDonald, 2001). As to high schools, 88% were religious in 1920, 85.4% in 1930; 83.5% in 1940; and 83.4% in 1950 (McDonald, 2001).

A seismic shift began to occur in the 1950s that made its presence felt in 1960. During the 1950s, the percentage of religious teachers declined to 73.1% in elementary schools and 75.5% in high schools. Over ensuing decades, the percentages for elementary and secondary schools, respectively, were 46.6% and 52.1% in 1970, 28% and 31% in 1980, 13.3% and 17.6% in 1990, and 5.7% and 8.4% in 2001 (McDonald, 2001). Currently, 96.5% of teachers in Catholic elementary schools are lay while 95.8% of teachers in high schools are lay (McDonald, 2008). While these reports do not offer information on administrators, it is probably fair to assume that a similar shift has occurred. As reflected in the later discussion of litigation of teachers under federal statutes, this transformation in the relationship between labor and management has had significant legal ramifications for the governance structures in Catholic schools.

Current data also reveal that as of 2007-2008, parishes operate 73.8% of Catholic elementary schools, 12.2% are run as inter-parish schools, 7.6% are diocesan in nature, and 12.1% are private (McDonald, 2008). As to high schools, 10.6% are run by parishes, 9.0% are operated as inter-parish, 36.4% are diocesan in nature, and 44% are private (McDonald, 2008). Although the data do not delineate between elementary and secondary schools, during the same school year, 85.1% of Catholic schools had some form of board, commission, or council (McDonald, 2008). Unfortunately, the data do not specify what percentages of boards are purely advisory to pastors or other ecclesiastical leaders and which have final decision-making authority in areas of school governance. Even so, as discussed below, civil law in the United States has created exceptions that allow religious leaders to exercise governance controls that afford them the opportunity to preserve their religious identities consistent with Church teachings.

Against the backdrop of the systemic, albeit, unintended transformation of Catholic education by its increasingly lay nature, even as bishops and pastors retain jurisdiction over the governance structures of the schools, the remainder of this article reflects on the relationship between canon law and civil law. In focusing on the reasonably smooth relationship between these two seemingly incompatible legal systems, due to canon law being based on a codified system of law that places little reliance on judicial interpretations of statutory and contractual law leading to the creation of common law principles, the rest of this article examines the ways in which American civil law and canon law interact.

Canon Law and the Governance of Catholic Schools

Now more than a quarter of a century old, the most recent version of the Code of Canon Law (1983) governs the establishment and operations of Roman Catholic elementary and secondary schools as well as institutions of higher education for the universal Church (Grochowski, 2008). Title III of the Code of Canon Law, which is part of Book III, "The Teaching Office of the Church," consisting of canons 793-821, pertains to Catholic education. In fact, the second canon in this title makes it clear that "Pastors . . . have the duty of making all possible arrangements so that all the faithful may avail themselves of a catholic [*sic*] education" (Can. 794, § 2). Chapter 2 of this title devotes an additional 11 canons to "schools," clearly delineating elementary and secondary schools from the Catholic universities and other institutions of higher studies that are covered in canons 807-814, which are beyond the scope of this article in light of the significant variations in governance structures between these two differing levels of education.

After highlighting the responsibility of parents to attempt to have their children educated in Catholic schools, canons 796-799 address preliminary matters that are incident to school governance, material that is germane to this article. To this end, in addition to stipulating that "the Church has the right to establish and to direct schools for any field of study or of any kind and grade" (Can. 800, § 1), the code states that "if schools which offer an education imbued with a Christian spirit are not available, it is for the diocesan bishop to ensure that they are established" (Can. 802, § 1).

According to the code, a "Catholic school is understood as one which a competent ecclesiastical authority or a public ecclesiastical juridic person directs or which ecclesiastical authority recognizes as such through a written document" (Can. 803, § 1) and that "instruction and education in a Catholic school must be grounded in the principles of Catholic doctrine; teachers are to be outstanding in correct doctrine and integrity of life" (Can. 803, § 2). This canon concludes that "even if it is in fact Catholic, no school is to bear the name Catholic school without the consent of competent ecclesiastical authority" (Can. 803, § 3).

Focusing on the role of bishops in the governance of Catholic education, the code points out that insofar as Catholic schools "are subject to the authority of the Church...conferences of bishops [have the power] to issue general norms about this field of action and for the diocesan bishop to regulate and watch over it" (Can. 804, § 1). In a matter that has generated litigation pursuant to Title VII, this canon adds that the "local ordinary is to be concerned that those who are designated teachers of religious instruction in schools,

even in non-Catholic ones, are outstanding in correct doctrine, the witness of a Christian life, and teaching skill" (Can. 804, § 2). At the same time, the code notes that each "local ordinary has the right to appoint or approve teachers of religion and even to remove them or demand that they be removed if a reason of religion or morals requires it" (Can. 805), including those in their dioceses "which members of religious institutes have founded or direct" (Can. 806). These provisions have resulted in litigation when principles of American statutory and common law conflict over the rights of teachers in Catholic schools.

In sum, this brief examination of the relevant sections of the Code of Canon Law illustrate how local bishops, and by extension, pastors have the authority to direct governance activities in Catholic schools even as they exist in the larger microcosm of American education. In light of the tension that occasionally emerges in the otherwise smooth working relationship between canon and civil law, the next section examines key elements in American jurisprudence that may simultaneously enhance, and limit, the authority of Church leaders to direct governance activities in Catholic schools.

Civil Law

Insofar as Catholic schools operate within the wider universe of nonpublic schools in the United States, they are now subject to American civil law due to changes in the second half of the 20th century such as the adoption of Title VII and other federal anti-discrimination statutes. Due to the significant impact that the law of contracts and selected federal statutes and accompanying judicial interpretations can have on governance activities in Catholic schools, this section reviews key elements of this relationship.

Contracts

It almost goes without saying that contracts and employment issues go to the heart of governance issues in Catholic schools in light of their impact on school operations. As such, this brief review of the law of contracts highlights issues with the greatest implications for Catholic schools.

The basic elements of contracts are mutual assent, reflected by offer and acceptance; consideration; legally competent parties; legal subject matter; and agreement in a form required by law. In the employment context, mutual assent signifies that parties must agree on such essential elements as salary, length of contracts, and teacher behaviors. For example, litigation arose after school officials terminated the employment of a teacher who lied on her employment application to officials in a religiously affiliated nonpublic school.

An appellate court in Louisiana held that since the teacher's answers improperly induced officials to hire her by leading them to believe that she possessed principles that she lacked, her doing so vitiated their consent such that the parties had not entered into a valid contract insofar as there was no agreement (*LaCross v. Cornerstone Christian Academy of Lafayette*, 2004). The court explained that since the teacher's dishonesty on her application led officials to rely, mistakenly, on her assertions that she would refrain from drinking alcohol, the parties had not entered into a valid contract.

Consideration, or that which each side pays for a promise or performance, is something of value, usually money in the form of salary, in return for services or job performance. Promises to make gifts or to perform gratuitous services, such as the duties carried out by parents and other volunteers in school, are not contracts because they are not supported by consideration. In a broader sense, consideration is present if individuals, in return for making promises, do anything legal that they are not required to do, or do not do something that they can legally do. In the context of Catholic education, this includes the private behavior of faculty members, particularly dealing with human sexuality, pregnancy, and marital status, that although legal, can, as discussed below in the material on Title VII, result in the termination of employment if the actions that violate Church teachings are known publicly to others.

Legal competency in the context of school settings means that the parties must be authorized to enter into agreements. This principle stands for the proposition that contracts must be ones that pastors, presidents of independent schools, or boards, however they are named in Catholic schools, have the legal ability to form them and that employees or prospective employees are empowered to enter such agreements. Agreements exceeding the contractual powers of educational officials, also known as *ultra vires*, literally, "beyond the powers," are unenforceable. Illustrations of this principle might be reflected if educational leaders were to direct employees to ignore statutory reporting rules in states with such law in cases of child abuse in favor of notifying school administrators.

Contracts must not only be in the proper form, meaning that they must be in writing, in order to be enforceable, but individuals must be of legal age, typically 21, when they enter into contracts. In other words, even though oral contracts may be as binding as written ones, in order to be enforceable, certain types of contracts, discussed in the next paragraph, must be in writing. At the same time, under the parole evidence rule, absent evidence to the contrary such as memos suggesting that a key term such as salary or teaching duties may change depending on financial exigencies, since written agreements are intended to be treated as the final agreements between parties, courts refuse to

permit individuals to modify their agreements by introducing contemporaneous oral statements that change the content of contracts (*Russell v. Halteman's Administratrix*, 1941).

Even if agreements are not contained on single pieces of paper, courts accept that parties formed contracts as long as all essential terms are in writing and there are express references to other writings or such connections between documents demonstrating that they relate to the same contracts (*Mariani v. School Directors of District 40*, 1987). This concept, otherwise known as the legal principle of incorporation by reference, comes into play in the cases discussed below involving teachers who challenged their dismissals due to their being pregnant or married to a man who was divorced. Under this principle, courts have allowed documents that were not part of the contracts themselves, such as the *Catechism of the Catholic Church* (1994), to be incorporated into agreements by reference, meaning that although they were not explicitly included as parts of the agreements, the parties were expected to comply with their terms.

Under the common law principle known as the statute of frauds that has been made statutory in most jurisdictions (*Mays-Maune & Associates v. Werner Brothers*, 2004), specified types of contracts that are important for schools must be in writing in order to be enforceable. The most important of these, from the point of view of Catholic and other schools, is that agreements that, by their terms, cannot be performed within one year must be in writing (*Senghas v. L'Anse Creuse Public Schools*, 1962). For example, if a principal and teacher enter into a contract in March under which the teacher will work for the following school year that begins in September and ends in June, the contract must be in writing in order to be enforceable since it cannot be completed within 12 months of when it was first formed.

If parties make mutual mistakes, meaning that both sides are mistaken about a key term, such as salary or one's level of education, in written contracts courts may correct or reform their errors or can invalidate agreements on the ground that the parties failed to achieve a meeting of the minds. In such a case, where a secretary used the wrong form, indicating that a superintendent was hired for 1 year rather than 2 years, the Supreme Court of Arkansas affirmed that a board could not subsequently claim that the agreement was for 1 year (*Hampton School District No. 1 of Calhoun County v. Phillips*, 1971). The court found that since the parties wished to enter into a 2-year contract, having their signatures affixed to the wrong form did not change their intended agreement. If an error is unilateral, as in the case of a moving company's bid to transport the contents of school was one-third of the amount that it billed, an appellate court decided that institutions cannot recover for these mistakes

(*A.A. Metcalf Moving & Storage Co. v. North St. Paul-Maplewood Oakdale Schools*, 1998). An appellate court in Minnesota reasoned that recovery was inappropriate absent evidence that board officials acted in any way to mislead or take advantage of the moving company since they made additional inquiries into the bid and confirmed the company's confidence in its offer.

An applied example of how governance issues and contracts can impact operations in Catholic schools is the Supreme Court's 1979 opinion in *National Labor Relations Board v. Catholic Bishop of Chicago* (*Catholic Bishop*). In *Catholic Bishop*, the Court affirmed that the National Labor Relations Board (NLRB), which serves as forum for dispute resolution in private sector dispute labor relations, lacked the jurisdiction to intervene in a dispute over whether officials in Catholic schools could be required to engage in collective bargaining with their teachers. Rather than engage in a discussion of the First Amendment issues that might have arisen over church-state relations, the court relied on statutory interpretation in rendering its judgment. To this end, the Court determined that absent clear congressional intent authorizing the NLRB to intervene, it lacked the power to serve as arbiter in this dispute, effectively leaving teachers in Catholic schools with little recourse unless they were protected by state laws.

Federal Statutes

Title VII of the Civil Rights Act of 1964. Enacted in response to the Civil Rights movement that followed the Supreme Court's monumental decision in *Brown v. Board of Education* (1954) invalidating racial segregation in public schools, the Civil Rights Act of 1964 sought to codify many of the equal opportunities advances that the judiciary helped to bring about. At the heart of the Civil Rights Act is Title VII, the most significant federal anti-discrimination statute dealing with employment. In its most relevant part, Title VII reads that:

It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (42 U.S.C.A. § 2000e-2(a))

Title VII acknowledges the tension that may arise between the authority of ecclesiastical employers to retain legitimate governance control in their schools and the rights of employees to be free from workplace discrimination. Title VII thus provides significant protection to religious employers since it permits them to set bona fide occupational qualifications, including religion, while allowing them to limit hiring in key positions to members of their respective faiths. Yet, as discussed below, judicial interpretation of Title VII and the Age Discrimination in Employment Act of 1967 (ADEA), another federal anti-discrimination law that prohibits discrimination against employees 40 years of age and above, that has been subject to litigation in Catholic schools, recognizes that a distinction, one that may be very fine at times, can be made between the duties of educational leaders acting under their authority to control school governance and on matters of secular concern. Courts are thus unwilling to intervene in areas including whether teachers witness to the Catholic faith in their public-professional lives, such as when they are pregnant outside of wedlock or marry outside of the Church. Yet, courts are willing to assert their jurisdiction over secular matters, including whether teachers in Catholic schools can engage in bargaining over the terms and conditions of their employment as well as whether they were subject to unlawful age discrimination.

Three of the four exemptions under Title VII have a significant impact on governance over labor matters in Catholic schools to the extent that they permit institutional officials to escape charges of discrimination based on religion. These four exemptions apply to bona fide occupational qualifications; individuals who perform duties in ministerial capacities; institutions that are in whole or in substantial part, owned, supported, controlled, or managed by religious bodies; and institutions with 15 or fewer employees.

The first, and arguably most important, exemption deals with circumstances where "religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the operations of that particular business or enterprise" (42 U.S.C.A. § 2000e-2(e)(1)). In such a dispute, the Third Circuit affirmed that a teacher at a Roman Catholic school in Pennsylvania who claimed that she was dismissed due to age discrimination could not proceed with her suit. The court upheld a grant of summary judgment in favor of school officials, essentially dismissing the teacher's claim on the basis that she failed to refute the defense of administrators that she was fired for violating Church teachings by marrying a man who was divorced (*Geary v. Visitation of Blessed Virgin Mary Parish School*, 1993).

The Sixth Circuit subsequently addressed the nonrenewal of the contract of a teacher in a Catholic elementary school in Ohio who gave birth to a

child 6 months after getting married. The court referred to language in the teacher's contract that "by word and example you will reflect the values of the Catholic Church" (*Cline v. Catholic Diocese of Toledo*, 2000, p. 656), that was incorporated by reference. Even so, the court refused to uphold a grant of summary judgment in favor of the diocese that would have essentially dismissed her suit. The Sixth Circuit returned the dispute to trial court for further consideration since it was uncertain whether officials chose not to renew the teacher's contract solely due to her pregnancy. Conversely, the same court previously upheld the dismissal of a suit filed by a former preschool teacher in a Christian school who alleged that she was dismissed due to her pregnancy (*Boyd v. Harding Academy of Memphis*, 1996). The court affirmed that officials did not violate Title VII since the former teacher was unable to show that they applied the policy against premarital sex in a discriminatory manner.

In another earlier case, a federal trial court in New York rejected a motion for summary judgment entered on behalf of a Christian school that would have rebuffed the claim of an unmarried teacher with an otherwise good record who alleged that her contract was terminated due to her pregnancy (*Ganzy v. Allen Christian School*, 1998). The court thought that insofar as material issues of fact existed over why officials terminated the teacher's contract since she claimed that she was never informed that she could have been fired for engaging in sexual relations outside of marriage, her suit could proceed. Interestingly, to the extent that this would appear to be self-evident in the environment of a Christian school, the court rejected the school officials' argument that while no one advised the teacher about the need for "chastity" before marriage, and there was no reference to it in her contract, it was implied on religious grounds.

A closely related second exemption applies to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities" (42 U.S.C.A. § 2000e-1). This is sometimes referred to as the ministerial exemption, with the burden of proof of the necessity of the BFOQ resting on employers, even if individuals are not ordained clerics. In order to apply this exemption, officials acting on behalf of religious institutions must be able to prove that the teaching duties or other activities of faculty members and other staff are so integrally related to furthering the spiritual and pastoral missions of their employers that their duties may be treated as ministerial. A case illustrating the application of this principle in a Catholic school arose in Wisconsin. An appellate court affirmed that since a first grade teacher did not have a ministerial position, officials were precluded from denying her the

opportunity to adjudicate her claim of age discrimination (*Coulee Catholic Schools v. Labor and Industry Review Commission, Department of Workforce Development*, 2008).

The third exemption, which applies to institutions that are

in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university, or other educational institution...is directed toward the propagation of a particular religion (42 U.S.C.A. § 2000-(e)(2)(e))

permits policies that allow hiring preferences for members of a particular faith. In practice, this means that as long as institutional officials establish policies and practices of granting hiring preferences for Catholics or members of their own faiths, then they are likely to be upheld. In a case of this type, albeit set in higher education, the Eleventh Circuit affirmed that officials at a Baptist university could limit a faculty member's teaching assignments to undergraduate classes and prevent him from teaching in its divinity school due to religious differences that he had with his dean (*Killinger v. Samford University*, 1997). The court added that even though the university was no longer under the direct control of a religious governing body, it was entitled to the exemption because it was still substantially supported by that church.

A fourth exemption under Title VII is that it is inapplicable to institutions with 15 or fewer employees. Accordingly, Title VII has a limited impact on K-12 schools since, for the statute's purposes, these schools are typically considered part of the larger religious organizations to which they belong (42 U.S.C.A. § 2000e(b)).

The Third Circuit, in a case from Delaware, that did not apply Title VII's exemptions, upheld the authority of educational officials to control faculty behavior at a Catholic school. The court affirmed the dismissal of an earlier judgment that officials did not violate the rights of a faculty member who taught both English and religion to seventh- and eighth-grade students when they terminated her employment because she signed an advertisement in a local newspaper offering her support of the Supreme Court's having legalized abortion, even though she knew this position contradicted Church teachings (*Curay-Cramer v. Ursuline Academy of Wilmington*, 2006). In essentially deferring to the governance authority of educational officials to ensure doctrinal compliance, the court reasoned that insofar as the teacher was not engaged in protected free speech activity when she signed the newspaper advertisement, she failed to present a viable claim that she was a victim of retaliation. The court was satisfied that officials offered a valid justification for terminating

the teacher's employment, since she violated Church teaching of which she was aware.

Age Discrimination in Employment Act. As reflected by the case in the discussion of Title VII, wherein the Third Circuit rejected a discrimination claim, federal laws and courts acknowledge a distinction between legitimate governance issues and secular matters in Catholic schools. As such, courts have reached mixed results in litigation involving the ADEA. For example, when school officials terminated the employment of a theology teacher at a Catholic high school, the federal trial court in Colorado granted the archbishop's motion to dismiss the claim (*Powell v. Stafford*, 1994). The court explained that even though the teacher raised the issue of age discrimination, since he taught theology the application of the ADEA would have violated the Free Exercise and Establishment Clauses of the First Amendment. In other words, the court maintained that since judicial intervention was not supported by a compelling interest in light of the fundamental right of Church officials to exercise governance over their schools by selecting who could be trusted with spiritual function of teaching its ecclesiastical doctrine, there was no basis on which it could properly assert jurisdiction.

On the other hand, the Second Circuit and a federal trial court in Indiana agreed that the application of the ADEA would not have violated the governance rights of officials in Catholic schools. In the case from the Second Circuit, the court noted that the application of the ADEA to a mathematics teacher in a Catholic high school in New York City, even though he allegedly failed to meet his duties to leading students in prayer and accompanying them to Mass, would not have violated the non-entanglement requirements of the First Amendment. The court pointed out that applying the ADEA was permissible insofar as the sole legal issue was whether the teacher was unjustifiably treated differently due to his age and that the religious duties he allegedly failed to carry out were easily isolated and defined (*DeMarco v. Holy Cross High School*, 1993). The Second Circuit held that the federal trial court should have been able to focus on whether the teacher was dismissed on account of his age or over his failure to perform religious duties and it could have done so without having to consider the validity or truthfulness of religious teachings at the school. The federal trial court in Indiana applied a similar rationale in allowing the ADEA to be applied where a plaintiff who taught a variety of subjects, including religion, in a Catholic elementary school claimed that her dismissal was a form of age discrimination (*Guinan v. Roman Catholic Archdiocese of Indianapolis*, 1998).

Collective Bargaining

In a case that went to the heart of issues associated with school governance, while reflecting changes resulting from the dramatic transformation of faculties in Catholic schools, *Catholic Bishop*, the Supreme Court refused to permit the NLRB to intervene in a dispute over whether teachers in Catholic high schools could engage in collective bargaining with their employers. As suggested earlier, the Court relied on statutory construction of federal labor law in order to avoid the otherwise difficult questions that might have arisen due to the religious nature of the schools that could have impacted on school governance.

Later courts reached mixed results about the potential impact that collective bargaining could have on governance in Catholic schools. On the one hand, a year after the Supreme Court resolved *Catholic Bishop*, in *National Labor Relations Board v. Bishop Ford Central Catholic High School* (1980), the Second Circuit applied *Catholic Bishop* in a dispute from New York City. Even though the high school was operated as a private Catholic school rather than one that was run by the diocese, with its own independent governing board consisting of lay people, the court decided that the NLRB could not assert its jurisdiction in a dispute over bargaining. The court concluded that since the school's religious mission remained intact and the diocese conveyed it to the independent board on the condition that it continued to operate as a Catholic high school, there was no basis on which the NLRB could exercise its authority.

In like fashion, the Supreme Court of Oregon refused to apply a state, rather than federal, law in a dispute over whether the State Educational Labor Relations Board (SERB) could resolve a dispute over the certification of a bargaining representative for teachers in a private high school that the archdiocese owned and operated (*Central Catholic Education Association v. Archdiocese of Portland*, 1996). The court determined that insofar as the archdiocese was not an employer within the meaning of federal labor law, the state statute was inapplicable. The court specified that in light of the fact that state law required employers to meet the definition set in federal law before the SERB could assert jurisdiction, and the archdiocese failed to do so, the SERB could not intervene.

On the other hand, 4 years later, albeit under a state law, in *Catholic High School Association v. Culvert* (Culvert, 1985), the Second Circuit found that a labor law in New York did grant the State Labor Relations Board (SLRB) the authority to intervene in a dispute over bargaining in Catholic schools. The court observed that the SLRB could become involved pursuant to the state

law since the duty of educational leaders in the Catholic schools to engage in bargaining with their teachers did not involve excessive relations between church and state. In this regard, the court pointed out that the negotiations were to take place over mandatory terms and conditions of employment such as salary and benefits, all of which were secular in nature. In so doing, the court was able to distinguish between secular and religious elements associated with school governance.

Two other state Supreme Courts, in Minnesota (*Hill-Murray Federation of Teachers v. Hill-Murray High School*, 1992) and New Jersey (*South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 1997), agreed that under state laws officials at Catholic schools could not refuse to engage in bargaining with the representatives chosen by their teachers. In both cases, the courts were not only able to distinguish secular and religious issues, but did not view bargaining as significantly impacting the governance rights of religious officials as long as negotiations concentrated on secular matters such as salary and benefits. Further, in *National Labor Relations Board v. Hanna Boys Center* (1991), the Ninth Circuit was of the view that since cooks, cooks' helpers, recreation assistants, maintenance workers, and child-care workers were secular employees with no teaching function at a residential school for boys, they were employees within the jurisdictional authority of the NLRB. The court thus upheld an order of the NLRB directing school officials to allow an election at the end of this 6-year fight.

Recommendations

As noted above, in enacting statutory protections against employment discrimination, Congress carefully took two potentially conflicting sets of concerns into account. More specifically, Congress balanced the interests of religious leaders to retain sufficient control over issues related to the governance of Catholic schools consistent with their duty to comply with the Code of Canon Law, particularly with regard to the hiring of teaching staff against the rights of faculty members and other employees to gainful employment. In the same way, leaders in Catholic education would be wise to consider the following seven suggestions that allow them to engage in the same kind of balancing as they carry out their governance duties. Of course, as bishops, diocesan leaders, pastors, principals, governing boards, and other educational leaders implement employment policies, they should do so by witnessing the need to act in the spirit of Christian justice and Gospel values for their employees.

In the first of two related initial matters, educational leaders both at the diocesan and school levels should provide ongoing professional development opportunities, especially for administrators, but also for teachers, so that they can familiarize themselves with the appropriate dimensions of the ways in which the Code of Canon Law and civil law interact. Offering professional development opportunities on how these parallel systems of law impact governance and employee relations in Catholic schools can provide a solid background to enhance policy development that meets the requirements of both legal systems.

Second, in an overlapping concern, Church leaders, particularly at the diocesan level, should work with teacher and administrator preparation programs at institutions of higher learning so that the latter can include units, if not courses, on the nature of and relationship between canon and civil law. Encouraging educators in preparation programs to offer such classes should allow administrators and teachers to "hit the ground running" while helping to ensure better initial, and hopefully developing, understandings of the practical relationship between these two overlapping sets of legal obligations. Moreover, as discussed in the ensuing points, adopting a proactive approach should help in developing governance policies for schools since both administrators and teachers need to acquire a better understanding of applicable legal requirements under both canon and civil law.

Third, when leaders in Catholic schools, working with their attorneys, prepare job descriptions, employment contracts, teacher handbooks, policies, and other documents, they should keep two additional subpoints in mind. First, documents should follow the leads of those cases such as *Culvert* and its progeny in which courts distinguish between the ministerial/governance concerns, such as the teaching of religion, and those that are purely lay persons, such as considerations of salary and benefits, that can be subject to collective bargaining. Second, employment-related policies and documents should differentiate between religious and lay aspects of work-related duties as in *DeMarco*, where the teacher was disciplined in part for apparently failing to be attentive adequately to duties related to accompanying students to religious activities, then officials should develop BFOQs clearly setting forth qualifications along with rationales as to why they are being put in place. In the event that educational leaders create BFOQs for positions in which religion may be an essential job requirement, such as campus ministry or teaching theology, then officials should both make it clear in hiring policies that one's religion is to be taken into consideration and that they apply this rule consistently.

Fourth, educational leaders need to bear in mind that if religious employers wish to include Church teachings on matters such as alcohol consumption, premarital sexual relations, pregnancy, and/or marriage to individuals who are divorced or not of the Catholic faith, in the employment contracts and policies they should do so carefully and explicitly. By way of illustration, suggested language might read that "all employees are expected to familiarize themselves with the Church's teachings on sexuality as contained in the Catholic Catechism, a copy of which they were given when they signed their employment contracts" rather than use such broad language as "to abide by Gospel values." Contract language should also encourage teachers to check with administrators and other educational leaders if they have questions about these teachings.

Personal matters can become particularly thorny because, as the litigation discussed earlier suggests, courts tend to, but do not always, defer to religious employers on the extent to which employees adhere to Church teachings in both their public and, to the extent that it is observable, private lives. An older case from California offers a good application of this principle. The court explicitly declared that "[a] teacher's employment in the public schools is a privilege, not a right" (*Board of Education of the City of Los Angeles v. Wilkinson*, 1954). Moreover, since canon law dictates that "teachers are to be outstanding in correct doctrine and integrity of life" (Can. 803, § 2), then the legal standard that the court enunciated with regard to educators in public schools is all the more applicable to teachers in Catholic schools, since this means that educators should be exemplars of the faith to their students (and others). As such, making expectations as clear as possible can go a long way in proactively helping to avoid unnecessary and potentially expensive, not just in terms of financial cost, but also to the working atmosphere in schools, conflict that can tear educational communities apart.

Fifth, an unstated assumption that is present in the discussion of contract and policy development is the notion that educational leaders need to act on the advice of attorneys. To this end, school officials should work closely with lawyers who are knowledgeable not just about civil education law but also the Code of Canon Law. While retaining the services of attorneys with expertise in both of these areas may be expensive, the additional penny of a prevention would be dwarfed in light of the pound of cure that schools would incur in the event that labor disagreements resulted in litigation.

Sixth, it almost goes without saying that educational leaders should create governance policies that are consistent with Biblical norms and Church teachings on a wide array of topics, particularly with regard to labor and employment issues. By doing so, officials should do more than simply follow the letter of

the law, whether the Code of Canon Law or civil law, in developing workplace policies and procedures. In this way, school leaders will witness to Church praxis while hopefully further legitimizing their governance activities.

The seventh and final recommendation suggests that educational leaders should regularly update all school governance and labor policies, typically on an annual basis. Annual reviews of this type should take place during summer breaks at leadership retreats that are separate and apart from the regular school year so that time will have passed between any controversies that may have led to calls for changes and actually reworking the language and content of policies. Adopting a proactive approach should help in making changes in a thoughtful, reflective manner rather than in the "heat of the moment" that can lead to hasty and often less than well thought out changes. While keeping policies up to date by ensuring compliance with emerging legal developments cannot guarantee that either conflicts or litigation will not occur, they can certainly go a long way in demonstrating good faith to the courts that may well apply the benefit of the doubt in the event that disagreements arise.

Conclusion

To the extent that leaders in Catholic schools understand the different, yet ultimately complementary role between canon law and American civil law, especially Title VII, pertaining to matters of school governance, then their healthy working partnership is likely to continue to thrive. It is, then, important for educational leaders in Catholic schools to distinguish between religious and secular aspects of workplace assignments so as to ensure enduring labor peace and compliance with Church teachings while satisfying the needs of both juridical systems.

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